

Primary Examination for the Bachelor of Laws
Semester 2, 2013

105011 (Course ID) Administrative Law LAW 2504
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Official Reading Time:	10 mins
<u>Writing Time:</u>	<u>120 mins</u>
Total Duration:	130 mins

Instructions for Candidates

- This is an open book exam.
- There are two questions of equal value. Students must answer both questions.
- Each question should be answered with reference to the legislation provided at the beginning of the question.

Permitted Materials

- Candidates may take into the examination room any book or materials other than those borrowed from a University Library

DO NOT COMMENCE WRITING UNTIL INSTRUCTED TO DO SO

Question 1 Legislation:***Clean Energy Finance Commission Act 2012 (Cth) [Extracts]*****3 Object**

The object of this Act is to establish the Clean Energy Finance Commission to facilitate increased flows of finance into the clean energy sector.

4 Definitions

Board means the Board of the Commission.

clean energy technologies: see section 60.

complying grant: see subsection 59(2).

Commission means the Clean Energy Finance Commission established by section 8.

energy efficiency technologies: see section 60.

low-emission technology: see section 60.

renewable energy technologies: see section 60.

solely or mainly Australian-based: see section 61.

8 Establishment

(1) The Clean Energy Finance Commission (the *Commission*) is established by this section.

(2)...

9 Commission's functions

(1) The Commission has the following functions:

- (a) its grant function (see subsection 58(1));
- (b) to liaise with relevant persons and bodies...for the purposes of facilitating its grant function;
- (c) any other functions conferred on the Commission by this Act or any other Commonwealth law;
- (d) to do anything incidental or conducive to the performance of the above functions.

...

Part 6—Grant function

Division 1—Grant function

58 Grant function

- (1) The Commission's *grant function* is to provide grants, directly and indirectly, in relation to clean energy technologies.

Note: For *clean energy technologies*, see section 60.

- (2) Without limiting subsection (1), the Commission may perform its grant function by doing any or all of the following:
 - (a) making grants to businesses or projects for the development or commercialisation of, or in relation to the use of, clean energy technologies;
 - (b) making grants to businesses that supply goods or services needed to develop or commercialise, or needed for use in, clean energy technologies;
 - (c) ...
- (3) ...

59 Complying grants

- (1) The Board must take all reasonable steps to ensure that grants for the purposes (or purportedly for the purposes) of the Commission's grant function are at all times complying grants.
- (2) *Complying grants* are grants that are:
 - (a) in clean energy technologies (see section 60); and
 - (b) solely or mainly Australian-based (see section 61).

...

60 Clean energy technologies

- (1) Technologies that are any one or more of the following are *clean energy technologies*:
 - (a) energy efficiency technologies;
 - (b) low-emission technologies;
 - (c) renewable energy technologies.
- (2) *Energy efficiency technologies* includes technologies (including enabling technologies) that are related to energy conservation technologies or demand management technologies.
- (3) *Renewable energy technologies* includes:
 - (a) hybrid technologies that integrate renewable energy technologies; and
 - (b) technologies (including enabling technologies) that are related to renewable energy technologies.
- (4) A technology is a *low-emission technology* if the Board is satisfied that the technology results in emissions of CO₂ that are substantially lower than current standards.

- (5) Before making a grant the Board must, by writing, make guidelines setting out the matters to which the Board will have regard in satisfying itself that a technology is a clean energy technology.
- (6) ...

61 Australian-based grants

- (1) A grant for the purposes of the Commission's grant function is *solely or mainly Australian-based* if the Board is satisfied ... that the grant is solely or mainly Australian-based.
- (2) ...

64 Grant Mandate

- (1) The responsible Minister may give the Board directions about the performance of the Commission's grant function, and must give at least one such direction. The directions together constitute the *Grant Mandate*.
- (2) In giving a direction, the responsible Minister must have regard to the object of this Act and any other matters the responsible Minister considers relevant.
- (3) Without limiting subsection (1), a direction may set out the policies to be pursued by the Commission in relation to any or all of the following:
 - (a) matters of risk and return;
 - (b) technologies, projects and businesses that are eligible for grant;
 - (c) the allocation of grants between the various classes of clean energy technologies;
 - (d) the nature of the guarantees the Commission may give and the circumstances in which they may be given;
 - (e) broad operational matters;
 - (f) other matters the responsible Ministers consider appropriate to deal with in a direction under subsection (1).

65 Limits on Investment Mandate

The responsible Ministers must not give a direction under subsection 64(1):

- (a) that has the purpose, or has or is likely to have the effect, of directly or indirectly requiring the Board to, or not to, make a particular investment; or
- (b) that is inconsistent with this Act (including the object of this Act).

QUESTION 1

Sun Warrior Pty Ltd is a company which is aiming to bring revolutionary 'Space Solar Power System' (SSPS) technology to Australia. SSPS involves sending an array of mirrors into orbit, in order to capture the power of the sun and transmit that power back to Earth. SSPS has the potential to provide infinitely renewable clean energy, but the technology is still very new. The Japanese government has announced its commitment to developing SSPS. Sun Warrior Pty Ltd's shareholders and directors are all Australian, and its head office is in Sydney. However, at the moment most of its activities are based in Japan, as Sun Warrior's employees are working closely with the Japanese Space Agency to learn all they can about SSPS.

Clean Future ('CF') is a group of like-minded scientists based at various Australian universities. Its members share a passionate belief that Australia must increase its use of renewable energy, and that this must be based on science rather than political rhetoric. CF formed in 2007, with the object (as stated on its website) of becoming 'an independent scientific voice to inform the Australian Government and community on clean energy policy.' In the last six years members of CF have regularly made comments in television, radio, print and online media. CF has also made many submissions to the Commonwealth Government. Its members are disappointed, however, that the Government has not asked CF to take a more active role. None of its members have been invited to sit on government boards, and the government has not always given CF's opinions as much weight as the group had hoped.

Early in 2013, CF was alarmed to learn that the Clean Energy Finance Commission ('CEFC') is considering making a grant to Sun Warrior Pty Ltd. They believe that SSPS is unlikely to be a viable alternative energy source, as the setup costs are enormous, and the emissions produced by launching and maintaining the array of mirrors in space cancel out its environmental benefits. CF wrote to the CEFC explaining its concerns about SSPS. It asked the CEFC to provide CF with copies of any information the CEFC has on SSPS, and offered to help the CEFC interpret any scientific studies it intends to rely upon.

The members of the CEFC Board read CF's letter but agreed that it was not necessary to reply. They have considered a range of materials on SSPS, and have noted that there are doubts about its efficacy but believe that, on balance, this technology has the potential to be very effective. Among the materials they considered were several papers published in scientific journals. Most of the members of the Board did not read these papers, but instead relied on 'plain English' summaries prepared by a staff member with scientific expertise.

In July 2013 the Clean Energy Finance Commission announced its decision to grant \$400,000 to Sun Warrior Pty Ltd. The press release about the grant includes the following passages:

A number of studies have shown that SSPS can produce large amounts of energy with very low emissions. As with any new technology, the scientific evidence does not all point in the same direction, but it is the role of the Commission to encourage the exploration of new possibilities.

Sun Warrior Pty Ltd is an Australian company with an excellent international reputation. We are especially pleased to offer a grant to Sun Warrior Pty Ltd because of its commitment to employing as many workers as possible over the age of 60. Australia has an ageing population. The current government policy is to support efforts to keep people in the workforce as long as possible.

PLEASE SEE NEXT PAGE

CF is upset about this decision and wants to know if it can be challenged. Documents from the Commission recently obtained by CF in a freedom of information application disclose that there are no guidelines in place concerning clean energy technologies.

Following the September 2013 election, there is a change of government in Australia. The new government wants to take a different approach to renewable energy, and the CEFC does not form part of its plans. The government would like to repeal the *Clean Energy Finance Commission Act*, but doubts it could get this past the Senate.

In the early days of the new government the Energy and Commerce Minister went on the ABC television program Q&A and in a heated discussion said the following:

‘The main priority, no no no the only thing that matters, is that we get the price of electricity down for ordinary Australian families, and you simply can’t do that with low-emission renewable technologies.’

A week later the Energy and Commerce Minister issued the following direction under s 64 of the Act:

“I direct the Clean Energy Finance Commission to make no new grants.”

This direction effectively terminates the activities of the Commission.

The members of CF are incensed about these decisions and have sought your advice about options for review.

Question 2 Legislation:***Plant Health Act 2012 (SA) [Extracts]***

An Act to provide for the protection of plants from pests, the regulation of the movement of plants into, within and out of the State, and the control, destruction and suppression of pests.

3—Interpretation

(1) In this Act, unless the contrary intention appears—

accredited person means a person accredited under Part 4;

assurance certificate means— an assurance certificate issued by an accredited person under Part 4;

disease means a bacterium, fungus, protozoa, phytoplasma, virus or any other organism or pathogen;

importer means a person who brings or introduces plants or plant related products into the State for the purposes of sale or any other commercial purpose;

Minister means the Minister for Agriculture;

noxious insect means any species of migratory or gregarious grasshopper;

pest means a disease, an insect, a mite or other arthropod, a snail, slug or nematode, or any other organism that affects or may affect a plant or plant related product;

place includes any land, road or premises;

plant means—

(a) the whole or any part of a tree, vine, flower, shrub, vegetable or other vegetation; and

(b) the whole or any part of the fruit or nut of a tree, vine or shrub; and

(c) any material used for the propagation of a tree, vine, flower, shrub, vegetable or other vegetation, whether alive or dead (including timber that has been sawn or dressed);

plant health certificate means— a plant health certificate issued by an inspector under Part 5

sell includes possess, offer, display or consign for sale;

...

7—Prohibition on introducing pest affected plants or plant related products

(1) A person must not bring or introduce into the State a pest or a plant, or plant related product, affected by a pest.

Part 4—Accreditation schemes

16—Application for accreditation

(1) An application for accreditation for the purposes of this Part must be made to the Minister and must—

- (a) be in the manner and form, and contain the information, required by the Minister; and
- (b) be accompanied by the fee fixed by the regulations.

17—Grant of accreditation

(1) On application for accreditation to grant assurance certificates, the Minister must grant the accreditation sought by the applicant if satisfied—

- (a) that the applicant is a suitable person to hold such accreditation; and
- (b) if the applicant is a body corporate—that each director of the body corporate is a suitable person to be the director of a body corporate that holds such accreditation.

(2) For the purposes of determining the suitability of a person under subsection (1), the Minister may, without limitation, take into account—

- (a) any offence committed by the person against—
 - (i) this Act or an Act repealed by this Act; or
 - (ii) a corresponding law.
- (b) any offence of dishonesty committed by the person.

(3) Accreditation may be granted in the form the Minister considers appropriate.

18—Authority conferred by accreditation

Accreditation authorises the person named in the accreditation:

- (a) to issue assurance certificates in relation to the movement of a plant or plant related product within the State, into or out of the State, or for another purpose.
- (b) ...

19—Protection from proceedings

No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question a decision or determination of the Minister under this Part.

Part 5—Inspectors

44—Power to investigate

(1) An inspector may carry out an investigation as reasonably necessary for the purposes of—

- (a) determining whether a plant or plant related product is affected by a pest; or
- (b) determining the presence of noxious insects or other pests; or
- (c) identifying or tracing any cause or source or potential cause or source of a pest.

(2) An inspector may, for the purposes of an investigation under this section, examine, take samples from or test any insect or other pest, plant or plant related product.

45—Power to issue plant health certificates

(1) An inspector may issue a plant health certificate in a form approved by the Minister in relation to plants or plant related products—

- (a) grown, produced, processed, packed, used, treated or tested in the State; or
- (b) to be brought or introduced into the State.

(2) Without limiting the generality of subsection (1), a plant health certificate issued in relation to a plant or plant related product may certify as to any of the following matters:

- (a) that it is free of any or a specified pest;—

46—Orders relating to pest affected plants or plant related products

(1) If the Chief Inspector knows or reasonably suspects that a plant or plant related product is or might become affected by a pest, he or she may issue such orders under this section as may be reasonably necessary to prevent or minimise the outbreak or spread of the pest to any of the following persons:

- (a) a person who owns or has possession or control of the plant or plant related product;
- (b) a person who sold or supplied the plant or plant related product.

(2) The Chief Inspector may issue 1 or more of the following orders in relation to any plant or plant related product that is or might become affected by a pest:

- (a) an order requiring that it be kept at a specified place for a specified period or otherwise restricting or prohibiting its movement;
- (b) an order requiring that it be subjected to specified treatment;
- (c) an order requiring that it be subjected to examinations or tests at specified intervals or that other specified action be taken for the purposes of determining the presence of a pest;
- (d) an order restricting or prohibiting its sale or supply or restricting the purposes for which it may be used;
- (e) an order requiring that it be destroyed or disposed of in a specified manner;

...

48—Appeal to District Court

(1) A person who is aggrieved with the decision of an inspector or Chief Inspector under this Part may appeal to the Administrative and Disciplinary Division of the District Court against the decision.

(2) An appeal must be instituted within 28 days of the making of the decision appealed against.

(3) The inspector or chief inspector must, if required by the applicant for the review, state in writing the reasons for the decision.

QUESTION 2

There are two ways commercial plant products can be verified for entry into South Australia: by direct inspection or by an assurance certificate whereby an accredited business can clear their own consignments of plants. Regular importers of products usually find an assurance certificate arrangement provides considerable cost savings and flexibility when they can self-clear products.

Lucerne is a plant with triple leaves and blue-violet flowers grown widely as a hay crop. HayHay Pty Ltd is a lucerne processing company based in Mount Gambier South Australia. HayHay Pty Ltd exports lucerne hay to China's dairy industry. This market is growing so rapidly that South Australian lucerne farmers are unable to keep up with demand and HayHay Pty Ltd needs to import lucerne from Victoria and New South Wales.

For over 50 years the lucerne company in Mount Gambier that was the predecessor of HayHay Pty Ltd had been run as a family owned business by the Billy family. Unfortunately, in 1999 William Billy ran the business into the ground. He incurred over 15 million dollars in debt and was convicted and jailed for fraud. The Billy family company was taken over by HayHay Pty Ltd and with the help of the new Chinese markets and the new company directors' reputation for integrity, HayHay Pty Ltd saved the jobs of all the employees and has become a great success. No-one in the Billy family has had any involvement with the company since William Billy's trial.

Earlier this year HayHay Pty Ltd applied to the South Australian Minister for Agriculture to be an accredited person to issue assurance certificates. The Minister refused to grant the accreditation. The reason the Minister gave was that the company has a history of company directors with convictions for fraud and there is continued involvement in the financial arrangements of the company by the director's brother-in-law. This reference to the director's brother-in-law is to Charles George. Charles George was the former finance manager who the police believed knew about William Billy's fraudulent behavior. The police were never able to find any proof and Charles George was never charged. Had the current directors of HayHay Pty Ltd known that the Minister was considering the involvement of Charles George they could have explained that while he, like all the original employees, had been kept on after the change of management, Charles George no longer works in the finance section. He was moved to the marketing department in 2002.

Two weeks ago green snail was detected in a lucerne crop near Cobram, Victoria. Green snail can significantly damage a wide range of plants including most leafy vegetables, cereal crops, and lucerne. In the past HayHay Pty Ltd has imported lucerne from Cobram on a regular basis, but all shipments in the last six months have been from New South Wales. Last week the Chief Inspector issued an order prohibiting the sale of all interstate lucerne and requiring that all lucerne held by HayHay Pty Ltd be destroyed.

HayHay Pty Ltd wishes to challenge these decisions and has sought your advice about options for review.